85-1848

NO. _____

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT

OF THE UNITED STATES

October, 1985 Term

FRED A. KOEHLER, Petitioner, vs. ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation, Respondent.	)	On Writ of Certiorari to the Supreme Court of Illinois

APPENDIX

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EDITOR'S NOTE

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NO. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Appellant,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD CO.	)
	)
Appellee.	)

(Date Entered: February 19, 1986)

ORDER

This matter has come for consideration upon the motion of appellant to stay the mandate of this Court pending appeal or application for certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for certiorari or the expiration of the period within which

said application or notice may be filed. If certiorari is applied for or notice of appeal is filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or certiorari may be sought.

/s/ Joseph H. Goldenhersh
Justice, Supreme Court of
Illinois

NO. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Appellant,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)
	)
Appellee.	)

(Date Entered: February 4, 1986)

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Goldenhersh, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 14, 1986.

Enclosed is a copy of Justice Simon's dissent.

JUSTICE SIMON, dissenting:

Because the plaintiff's claim in this case is wholly independent of rights and obligations embodied in the defendant's collective-bargaining agreement, I cannot agree with the majority's conclusion that the Railway Labor Act (45 U.S.C. sec. 151 *et seq.* (1982)) (RLA) preempts this action. Retaliatory discharge is a tort arising from State law, while the "wrongful" in wrongful discharge is an epithet denoting a discharge made in breach of a labor agreement. Retaliatory discharge is not the equivalent of wrongful discharge since the former is not an action premised on the employer's breach of contract. (See *Kelsay v. Motorola, Inc.* (1978), 74 Ill. 2d 172, 187.) Regardless of terms contained in the collective-bargaining agreement, the elements of retaliatory discharge remain the same. Even if the collective-bargaining agreement in this case were written most favorably for the employer, it could at most grant the employer the right to discharge the plaintiff at will, and an action for retaliatory discharge would still be well founded.

For this reason, *Jackson v. Consolidated Rail Corp.* (7th Cir. 1983), 717 F.2d 1045, is not an applicable precedent. That court equated retaliatory discharge with wrongful discharge in violation of a labor agreement, but the two terms are not synonymous. As Judge Posner noted in his separate opinion, retaliatory discharge is not a grievance within the Board's exclusive jurisdiction "because it would exist even if there were no collective bargaining agreement ***." 717 F.2d 1045, 1059 (Posner, J., dissenting in part).

The rationale for preemption in cases of wrongful discharge is that an allegedly wrongful discharge requires construction of the labor contract, and it is therefore a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board. (45 U.S.C. sec. 153 First (i) (1982); *Carbone v. Meserve* (1st Cir. 1981), 645 F.2d 96, 98 ("minor dispute" refers to disputes over the meaning of contractual terms).) Exclusive jurisdiction over minor disputes is vested with the Board because it has administrative expertise in "the interpretation of collective bargaining agreements," and because "uniform administrative interpretation

[of those agreements] is of great importance." (*Pennsylvania R.R. Co. v. Day* (1959), 360 U.S. 548, 551-52, 3 L. Ed. 2d 1422, 1426, 79 S. Ct. 1322, 1324.) It is apparent from the development of retaliatory discharge as a tort in this State that provisions of an employment contract are superfluous to a determination of whether a tortious discharge occurred. (See *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill. 2d 143, 149 ("to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective-bargaining agreement").) In fact, this court recently held that an action for retaliatory discharge does not lie where the plaintiff alleges that he was discharged in retaliation for pursuing private rights conferred by his contract of employment (*Price v. Carmack Datsun, Inc.* (1985), 109 Ill. 2d 65), so it cannot be said that the distribution of private rights in the defendant's collective-bargaining agreement is relevant to the outcome of this case.

In an action for retaliatory discharge, the only issues are why an employee was fired and whether that reason was in contravention of clearly mandated public policy (*Palmateer v. International Harvester Co.* (1981), 85 Ill. 2d 124, 133-34). These determinations are squarely within the expertise of a court of law. Not only is the Adjustment Board without jurisdiction over noncontractual disputes (*Southern Pac. Co. v. Joint Council of Dining Car Employees* (9th Cir. 1947), 165 F.2d 26), but also the Board—which is neither a court nor a governmental body (*Dahlberg v. Pittsburgh & L.E.R. Co.* (3d Cir. 1943), 138 F.2d 121)—is not particularly qualified to identify the public policy of this State or usurp the fact-finding function of a trial court.

The majority's reliance on *Andrews v. Louisville & Nashville R.R. Co.* (1972), 406 U.S. 320, 32 L. Ed. 2d 95, 92 S. Ct. 1562, is misplaced. *Andrews* holds only that *contractual* disputes must proceed through the RLA's administrative procedure even if the parties have agreed otherwise. There is no basis for the contention in the majority opinion that Andrews extends the preemptive effect of the RLA beyond contractual disputes. In fact, *Andrews* held the action in that case to be preempted because it was a contractual

dispute. (406 U.S. 320, 324, 32 L. Ed. 2d 95, 99, 92 S. Ct. 1562, 1564 ("petitioner's claim, and respondent's disallowance of it, *stem from differing interpretations of the collective-bargaining agreement.* *** [and h]is claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment").) Retaliatory discharge is a law of State rights and obligations existing "independently of private agreements"; since it cannot be "waived or altered by agreement," it is error to preempt State jurisdiction and defer to an administrative agency whose sole function is the interpretation of negotiated agreements. *Allis Chalmers v. Lueck* (1985), 471 U.S. ___, ___, 85 L. Ed. 2d 206, 216, 105 S. Ct. 1904, 1912.

This action does not implicate contractual rights or Federal labor policy. I cannot, therefore, see any basis in law or logic for preemption of an uncontrived tort action in favor of Federal procedures for the resolution of labor contract disputes, and I dissent.

NO. 60233

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

FRED A. KOEHLER,

Appellant,

vs.

ILLINOIS CENTRAL GULF RAILROAD CO.,

Appellee.

(Date Entered: December 20, 1985)

JUSTICE MORAN delivered the opinion of the court:

Plaintiff, Fred A. Koehler, filed suit in the circuit court of St. Clair County against defendant, the Illinois Central Gulf Railroad Company, his employer, alleging retaliatory discharge. Defendant moved to dismiss the suit, arguing that resolution of plaintiff's complaint for retaliatory discharge came within the exclusive jurisdiction of the National Railroad Adjustment Board pursuant to the Federal Railway Labor Act (45 U.S.C. secs. 151 through 164 (1982)) (RLA). The trial court denied defendant's motion but granted its motion to certify the question for interlocutory appeal pursuant to our Rule 308(a) (87 Ill. 2d R. 308(a)). The following issue was submitted for review:

> "Whether a railroad employee covered under the provisions of the Railroad [*sic*] Labor Act, 45 U.S.C. section 151 *et seq.* may bring an action in state court against his employer for wrongful discharge without first exhausting his administrative remedies available under the Railroad [*sic*] Labor Act."

A majority of the appellate court reversed the trial court and entered judgment dismissing plaintiff's complaint with prejudice. (123 Ill. App. 3d 1038.) In so deciding, the court did not address either the issue certified or

those briefed by the parties but relied instead on its decision in *Mouser v. Granite City Steel Division* (1984), 121 Ill. App. 3d 834, which held that the tort of retaliatory discharge was not available to an employee covered by a collective-bargaining agreement.

Plaintiff sought leave to appeal to this court. On leave to appeal, this court entered an order, under its supervisory authority, reversing the judgment of the appellate court and remanding the cause to the circuit court to proceed in conformity with *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill. 2d 143. This order was predicated on the belief that our recent decision in *Midgett* was dispositive. See 101 Ill. 2d 566.

Defendant moved for reconsideration of the supervisory order. In its memorandum supporting the motion, defendant argued that the RLA preempts any State court adjudication of employment-based disputes between railroads and their employees, including an action for retaliatory discharge. Upon reconsideration, the following order was entered: "[T]he motion for reconsideration of the supervisory order entered in this cause on October 19, 1984, is allowed. Reconsideration of this case will be confined to the Federal preemption issue [and the collective-bargaining-agreement issue]."

The factual basis of plaintiff's claim began with an injury to his right knee sustained in January 1972. Plaintiff recovered and was certified as fit to return to work with defendant by his physician and defendant's physicians. In June 1972, plaintiff filed suit to recover damages for the knee injury pursuant to the Federal Employers' Liability Act (45 U.S.C. secs. 51 through 60 (1970)) (FELA), a Federal statute applicable to interstate railroads in their capacity as employers. FELA imposes liability on railroad employers for injuries to employees caused by an employer's negligence. (45 U.S.C. sec. 51 (1970).) This suit was tried to a verdict, but the record does not indicate which party prevailed on the verdict.

Plaintiff sustained a second work-related injury in December 1978. The injury was to his back. In the course of various medical examinations conducted by defendant's

physicians occasioned by this second injury, interest in plaintiff's earlier knee injury was revived.

A physician for defendant reported that he was more concerned about plaintiff's prior knee injury than he was about the recent back injury. In a report to defendant in April 1979, the physician noted that the knee had undergone "degenerative change." Thereafter, in December 1979, the chief medical officer for defendant permanently disqualified plaintiff from his position as a carman welder because of "degenerative changes in the right knee." Plaintiff was permanently disqualified even though his physician had reported that plaintiff had no disability from either the knee or back injuries which would restrict him in the performance of his duties.

One week after his permanent disqualification plaintiff filed a grievance pursuant to the terms of the collective-bargaining agreement in effect between his union and defendant. One month later, in January 1980, plaintiff filed a second suit under FELA in State court seeking recovery for his back injury. The record does not disclose the result of this second FELA action. Six months later, in July 1980, plaintiff filed the instant action.

In his complaint, plaintiff alleged that his permanent disqualification as a carman welder was in retaliation for having sued defendant under FELA. At the time plaintiff filed his action for retaliatory discharge the second suit under FELA and his grievance were pending. Plaintiff's grievance has since been resolved. The grievance was referred to the National Railroad Adjustment Board in February 1981 as provided by the RLA. Resolution was reached in July 1983 when plaintiff was ordered reinstated with retroactive seniority upon securing a favorable medical report from a jointly selected panel of three physicians. Plaintiff was reinstated with full seniority pursuant to this order in September 1983.

This record reveals that, within seven months of his permanent disqualification as a carman welder, plaintiff had initiated actions in three separate forums. Our present concern is with the last action taken, the suit for

retaliatory discharge. We address the limited issue presented: Does the RLA preempt an action for retaliatory discharge brought by an employee covered by the Act?

The leading case on the preemptive effect of the RLA is *Andrews v. Louisville & Nashville R.R. Co.* (1972), 406 U.S. 320, 32 L. Ed. 2d 95, 92 S. Ct. 1562. There the Supreme Court held that an employee who was not permitted to return to work by his employer after recovering from injuries sustained in an automobile accident could not maintain a suit in State court on a State-law contract claim for wrongful discharge. The court found that the RLA governed the dispute. The court also held that the RLA preempted State actions based on wrongful discharge and that the National Railroad Adjustment Board has exclusive jurisdiction to adjudicate all claims arising under the RLA.

Plaintiff attempts to distinguish his case from *Andrews* by pointing out that *Andrews* addressed *wrongful* rather than *retaliatory* discharge. He concedes that wrongful discharge is a claim grounded in the contract of employment, thereby falling within the exclusive jurisdiction of the RLA. However, plaintiff contends that his claim of retaliatory discharge is not a contractual action but, rather, a tort action. Because his action is in tort, plaintiff argues that *Andrews* is inapposite. We disagree. The court in *Andrews* made it clear that the preemptive effect of the RLA was not limited to contractual disputes. The court explained that "the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent *stems not from any contractual undertaking between the parties but from the Act itself.*" (Emphasis added.) 406 U.S. 320, 323, 32 L. Ed. 2d 95, 99, 92 S. Ct. 1562, 1565.

Moreover plaintiff's contention was recently rejected by the United States Court of Appeals for the Seventh Circuit, in *Jackson v. Consolidation Rail Corp.* (7th Cir. 1983), 717 F.2d 1045, 1049. There, as in the instant case, a railroad employee sought recovery on a State-law tort claim for retaliatory discharge, alleging that he was terminated for filing an action under the FELA. The plaintiff in

Jackson argued that *Andrews* was not controlling because *Andrews* applied to "wrongful" rather to "retaliatory" discharge. The court did not find this distinction persuasive, characterizing retaliatory discharge as merely one type of wrongful discharge. (717 F.2d 1045, 1049.) The court went on to note that the State-law claim was "identical to the claim he would have made, had he pursued the grievance through administrative channels." (717 F.2d 1045, 1054.) Because the State-law tort claim and any claim brought under the RLA would be the same claims, the court found *Andrews* controlling and expressly held that the RLA preempts a State-law tort action for retaliatory discharge premised on termination for having filed suit under the FELA. 717 F.2d 1045, 1051, 1056.

We agree with the Seventh Circuit's analysis and application of *Andrews*. We therefore hold that the RLA preempts our State-law tort action alleging retaliatory discharge for having filed suit under the FELA where, as here, it is brought by an employee covered by the RLA.

Plaintiff seeks to avoid the preemptive effect of the RLA by arguing that his case falls within the ambit of certain recognized exceptions to preemption. Specifically, he argues that preemption does not apply "where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters & Joiners of America* (1977), 430 U.S. 290, 302, 51 L. Ed. 2d 338, 351, 97 S. Ct. 1056, 1064.

Plaintiff's reliance on *Farmer* is misplaced. First, the *Farmer* exception to preemption, by its terms, applies to the preemptive effect of the National Labor Relations Act (430 U.S. 290, 292, 51 L. Ed. 2d 338, 345, 97 S. Ct. 1056, 1059), not to the RLA. Second, assuming the applicability of *Farmer* to the instant case, our reading of the RLA indicates that a State-law action for retaliatory discharge would "threaten undue interference with the federal regulatory scheme." The RLA is an elaborate and extensive administrative scheme. (45 U.S.C. secs. 151 through 164 (1982).) Under this scheme "disputes *** growing out of

grievances" are to be resolved in the first instance by the parties. If the parties are unsuccessful, the RLA provides that the dispute be referred to the National Railroad Adjustment Board for resolution. (45 U.S.C. sec. 153 First (i) (1982).) Decisions of the Adjustment Board are final and binding. (45 U.S.C. sec. 153 First (m) (1982).) Under the RLA, a party dissatisfied with a decision of the Adjustment Board may obtain limited review in Federal district court with appeal to the court of appeals. (45 U.S.C. sec. 153 First (q) (1982).) The RLA does not accord original jurisdiction over employment-related disputes to either Federal or State courts. Original, exclusive jurisdiction is given to the Adjustment Board. (45 U.S.C. sec. 153 First (i) (1982).) As noted above, jurisdiction over appeals from decisions of the Adjustment Board is given the Federal courts. 45 U.S.C. sec. 153 First (q) (1982).

Our review of the RLA indicates that plaintiff's suit for retaliatory discharge is precluded as an "undue interference" with the dispute-resolution scheme of the RLA. Stripped to its essentials, plaintiff's suit is a reformulation in tort of his grievance which, as the record shows, fell within the purview of the RLA. Allowing plaintiff's suit to proceed would allow a State court, applying State law, to resolve "disputes *** growing out of grievances." (45 U.S.C. sec. 153 First (i) (1982).) Certainly, this result would unduly interfere with the operation of the dispute-resolution machinery of the RLA. Therefore, even if *Farmer* applies to cases arising under the RLA, it is of no assistance to plaintiff.

A thorough reading of the RLA makes clear Congress' intent that employment-based disputes between parties covered by the RLA are to be resolved exclusively pursuant to the Act. Under the RLA, State courts have no jurisdiction to hear and resolve such disputes. (45 U.S.C. secs. 153 First (i), (q) (1982).) Because plaintiff's tort action for retaliatory discharge is, in essence, an employment-based dispute, we hold that it is preempted by the RLA.

For the reasons here stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.

No. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Petitioner,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)
	)
Respondent.	)

(Filed March 27, 1985)

The motion by respondent for reconsideration of the order entered October 19, 1984 is allowed. The supervisory order is vacated, and the petition for leave to appeal is allowed. Notices of election shall be filed pursuant to Supreme Court Fule 315(g).

Golderhersh, J., took no part.

No. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,)
)
Petitioner,)
)
vs.)
)
ILLINOIS CENTRAL GULF)
RAILROAD COMPANY,)
)
Respondent.)

(Date Entered: October 19, 1984)

Leave to Appeal, Appellate Court, Fifth District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause and entered the following supervisory order:

> Although this appeal involves a claim that the plaintiff was wrongfully discharged for exercising rights under the Federal Employer's Liability Act (45 U.S.C. sec. 51 et seq.) rather than the Workers' Compensation Act, (Ill.Rev.Stat. 1983, ch.48, par. 138.1 et seq.), we consider the question to be comparable to that decided in Midgett v. Sackett-Chicago, Inc. (Oct.19, 1984), Nos. 59341, 59350 cons.

Accordingly, in the exercise of this court's supervisory jurisdiction, the judgment of the Appellate Court, Fifth District (123 Ill.App.3d 1038), is reversed, and the cause is remanded to the circuit court of St. Clair County for further proceedings consistent with the decision in **Midgett**.

Goldenhersh J., took no part.

No. 5-83-0401

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FRED A. KOEHLER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County
	)	
vs.	)	
	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,	)	
	)	
Defendant-Appellant.	)	

(Filed May 3, 1984)

PRESIDING JUSTICE WELCH delivered the opinion of the court:

Plaintiff Fred A. Koehler instituted this action against his employer, defendant Illinois Central Gulf Railroad Company, in the circuit court of St. Clair County. He alleged in his complaint that he had been wrongfully discharged from his employment for exercising his rights under the Federal Employers' Liability Act or FELA (45

U.S.C. §51 et seq.). The defendant moved to dismiss the complaint, but the trial court denied that motion. At the defendant's request, the court certified a question for interlocutory appeal, and we granted defendant's application for leave to appeal. (87 Ill.2d R. 308.) We must reverse the decision of the trial court because an employee who is covered by a collective bargaining agreement prohibiting termination without just cause may not maintain a tort action against his employer for retaliatory discharge.

The plaintiff's employment with the defendant was terminated in 1979. At that time, an action brought by the plaintiff against the defendant under the FELA was pending in the circuit court of St. Clair County, and, in 1974, the plaintiff obtained a verdict in his favor

against the defendant in a suit brought under the same enactment. As a member of the Brotherhood of Railway Carmen of America, their Helpers and Apprentices, the plaintiff was protected by a collective bargaining agreement between the defendant and the System Federation No. 99, Railway Employees' Department, AFL-CIO. That agreement prohibited the unjust termination of employment and provided for a grievance procedure in the case of violation of the agreement.

In December, 1979, the plaintiff's local union submitted a grievance on his behalf to the defendant. It was denied. Pursuant to the collective bargaining agreement, an appeal from this denial was taken within the defendant. The grievance was again denied. In February, 1981, the Brotherhood of Railway Carmen submitted the plaintiff's claim to the

National Railroad Adjustment Board. That claim was still pending when the notice of appeal was filed in the present case. In 1983, a hearing was held on the plaintiff's claim, the Board rendered its decision, and the plaintiff was reinstated as an employee of the defendant, with full seniority, but without retroactive pay or benefits.

The question certified by the trial court was whether an employee whose employment is covered by the Railway Labor Act (45 U.S.C. §151 et seq.), portions of which are incorporated by reference into the grievance procedures in the collective bargaining agreement at bar, may bring a wrongful discharge action in State court without exhausting the remedies provided by that act. Of course, the plaintiff has now exhausted those remedies by pursuing his claim to a

successful conclusion. The focus of the briefs in this court is instead upon whether the remedies established by the act pre-empt any State tort action for wrongful discharge.

Subsequent to oral argument in this case, we filed an opinion in **Mouser v. Granite City Steel Division** (1984), 121 Ill.App.3d 834, 460 N.E.2d 115. In **Mouser**, we examined conflicting decisions in the appellate court and the Illinois Federal courts on the issue of whether an employee covered by a collective bargaining agreement preventing discharge without just cause could bring an action for wrongful discharge against his employer. We observed that the policies behind that judicially-created tort were not present in the case of an employee covered by such an agreement. Along with the

majority of districts in this court, and the Federal courts in this State, we concluded that the tort of wrongful or retaliatory discharge was not available to an employee whose employment was governed by a collective bargaining agreement proscribing termination of employment without just cause.

There is no question that the plaintiff here is covered by such an agreement. Under Mouser, then, he may not maintain an action in tort for wrongful discharge under Illinois law. Having decided that no Illinois tort remedy supports the plaintiff's complaint, we need not decide whether such a remedy would be pre-empted by Federal law if it existed. Accordingly, the decision of the circuit court of St. Clair County is reversed and the

plaintiff's complaint is dismissed with prejudice.

ORDER REVERSED; COMPLAINT DISMISSED WITH PREJUDICE.

JONES, J., concurring.

NO. 5-83-0401

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FRED A. KOEHLER,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of St. Clair
	)	County
vs.	)	
	)	
ILLINOIS CENTRAL GULF RAILROAD CO., a corporation,	)	
	)	
Defendant-Appellant.	)	

(Filed May 3, 1984)

Mr. JUSTICE HARRISON, dissenting:

I respectfully dissent, for I believe that the result reached in this case operates to undermine the public policy considerations inherent in our supreme court's recognition of a cause of action for retaliatory discharge. In Kelsay v. Motorola, Inc. (1978) 74 Ill.2d 172, 384 N.E.2d 353, wherein such cause of action was recognized, the court also held that punitive damages may be awarded to the

discharged employee under appropriate circumstances. The court noted that, in the absence of the deterrent effect of punitive damages, there would be little to dissuade an employer from wrongfully discharging an employee. (74 Ill.2d 172, 186.) In so holding, the court joined those courts which have recognized that the situation of the employee and employer in today's society is hardly equivalent, and that the "mutuality of obligations" rule permitting discharge of the employee at will for any or no cause is unduly harsh in the modern world. (See Smith v. Atlas Off-Shore Boat Service, Inc., (5th Cir. 1981), 653 F.2d 1057, 1060-1063, and authorities cited therein.) In my view, the holdings in the instant case and the cases relied on in support of today's result operate to take away a significant part of what our

supreme court in Kelsay expressly gave, without restriction, to the employee discharged for exercising the rights expressly given him by legislative enactment. Nothing in Kelsay even remotely indicates that its protections are not to extend to employees covered by a collective bargaining agreement, and today's decision has the irrational effect of immunizing from punitive damages the employer who fires a union member, while providing no such protection to the employer who fires a non-union employee. Wyatt v. Jewel Companies, Inc. (1982), 108 Ill.App.3d 840, 841-42, 439 N.E.2d 1053.

Moreover, in addition to these general policy considerations, specific analysis of the differing functions of a collective bargaining agreement and the tort remedy for retaliatory discharge

underscores the erroneousness of the result reached by the majority herein. The issue before this court does not involve interpretation of a collective bargaining agreement, an appropriate matter for arbitration (Hendley v. Central of Georgia R.R. Co. (5th Cir.1980), 609 F.2d 1146,1151); rather, the question here is whether the terms of the agreement can preclude the pursuit of a wholly independent and judicially created remedy for retaliatory discharge. As observed by Justice Barry in his well-reasoned dissent in Cook v. Caterpillar Tractor Co. (1980), 85 Ill.App.3d 402, 407 N.E.2d 95, "in his complaint the plaintiff is not alleging that the discharge was wrongful in the sense that the terms of the collective bargaining agreement were violated. (citations) Rather, the plaintiff is

seeking damages for his retaliatory discharge based upon his pursuing a workmen's compensation claim. The plaintiff's cause of action sounds not in contract, but in tort. It is based not upon violation of the terms of the collective bargaining agreement, but upon a violation of the public policy of the State of Illinois to compensate employees for work-related injury." (85 IllApp.3d 402,407 (emphases in original).) Here, plaintiff's action is based upon an express public policy seeking to deter retaliatory discharge, and not upon anything granted to the employee under the terms of the collective bargaining agreement.

Finally, we should not ignore the reality that many collective bargaining agreements simply do not provide the discharged employee with protection

comparable to that afforded by Kelsay. As one law review article dealing with Kelsay has noted, reliance on collective bargaining agreements alone under the circumstances presented here may deprive the employee of any recovery in some cases, as when a union is reluctant to arbitrate, or may severely limit the employee's recovery. (Note, Kelsay v. Motorola, Inc.-Illinois Courts Welcome Retaliatory Discharge Suits Under the Workmen's Compensation Act, 1980 U.Ill.L.F.839, 852 & n.80, 853 & n.81.) Indeed, the potential for unfair diminution of the employee's recovery is graphically illustrated by this case, where plaintiff's full pursuit of his rights under the collective bargaining agreement yielded nothing better than reinstatement without retroactive pay or benefits. Such a

result does nothing to provide the disincentive for retaliatory discharge inherent in Kelsay. Today's decision, which eviscerates both the rights conferred on employees by Kelsay and the ability of the courts to give full force to legislative schemes designed for the protection of employees, is simply out of touch with the slow but steady evolution of the rights of employees in the latter half of this century.

No. 5-83-0401

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FRED A. KOEHLER, Plaintiff-Appellee, vs. ILLINOIS CENTRAL GULF RAILROAD COMPANY, Defendant-Appellant.	)	Appeal from the Circuit Court of St. Clair County
	)	No. 80-L-649

(Filed July 12, 1983)

ORDER

This cause considered on defendant-appellant's application for leave to appeal, and the Court being advised in the premises;

IT IS THEREFORE ORDERED that the application for leave to appeal is hereby GRANTED.

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

FRED A. KOEHLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 80-L-649
	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,	)	
	)	
Defendant.	)	

(Filed June 1, 1983)

ORDER GRANTING DEFENDANT'S MOTION TO CERTIFY QUESTION FOR INTERLOCUTORY APPEAL

The court having heard argument of counsel and being fully advised in the premises makes the following order:

1. Defendant's motion pursuant to the provisions of Ill.Rev.Stat., Ch.110A, §308 to certify a question for interlocutory appeal is allowed.

2. Plaintiff's complaint states a cause of action that he was wrongfully

discharged by the defendant railroad company for having filed and prosecuted lawsuits for personal injuries pursuant to the provisions of 45 U.S.C. §51-60, commonly known as the Federal Employers Liability Act.

3. The defendant corporation moved to dismiss plaintiff's complaint for wrongful discharge for the reason that plaintiff has not exhausted his exclusive administrative remedies under the provisions of the National Railway Labor Act, 45 U.S.C.A., §151 et seq.

4. This court denied the defendant corporation's motion to dismiss.

5. The court finds that there are substantial grounds for difference of opinion concerning this ruling and that an immediate appeal from its order may materially advance the ultimate determination of the litigation.

6. The court hereby certifies the following question for interlocutory appeal pursuant to the provisions of Ill. Rev.Stat. Ch. 110A, §308:

> "Whether a railroad employee covered under the provisions of the Railroad Labor Act, 45 U.S.C. §151 et seq. may bring an action in state court against his employer for wrongful discharge without first exhausting his administrative remedies available under the Railroad Labor Act."

7. The court further finds that there is no cause for delaying the proceedings in the Circuit Court and specifically denies defendant's motion for a stay of further proceedings pending any appeal.

Dated this 27 day of May, 1983.

/s/Judge Richard Goldenhersh

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

FRED A. KOEHLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 80-L-649
	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)	
	)	
Defendant.	)	

(Filed March 29, 1983)

ORDER

This cause coming before the Court; the Court being fully advised in the premises and having jurisdiction of the subject matter;

The Court finds:.....

IT IS THEREFORE ORDERED:

Motion to Reconsider is denied.

Enter:

/s/Richard P. Goldenhersh, Judge

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

FRED A. KOEHLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 80-L-649
	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)	
	)	
Defendant.	)	

(Filed November 4, 1982)

This cause coming before the Court; the Court being fully advised in the premises and having jurisdiction of the subject matter;

The Court finds.....

IT IS THEREFORE ORDERED:

Defendant's Motion to Dismiss denied. Defendant granted 28 days to answer.

Enter:

/s/Richard Goldenhersh, Judge

NO. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Appellant,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD CO.	)
	)
Appellee.	)

(Date Entered: December 20, 1985)

The mandate(s) of this Court will issue to the Appellate Court, Circuit Court or other Agency on January 17, 1986, unless a petition for rehearing (due January 10, 1986) or motion to stay the mandate is timely filed. Supreme Court Rule 368.

NO. 60233

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

FRED A. KOEHLER,

Appellant,

vs.

ILLINOIS CENTRAL GULF RAILROAD CO.

Appellee.

(Date Entered: December 20, 1985)

JUSTICE MORAN delivered the opinion of the court:

Plaintiff, Fred A. Koehler, filed suit in the circuit court of St. Clair County against defendant, the Illinois Central Gulf Railroad Company, his employer, alleging retaliatory discharge. Defendant moved to dismiss the suit, arguing that resolution of plaintiff's complaint for retaliatory discharge came within the exclusive jurisdiction of the National Railroad Adjustment Board pursuant to the Federal Railway Labor Act (45 U.S.C. secs. 151 through 164 (1982)) (RLA). The trial court denied defendant's motion but granted its motion to certify the question for interlocutory appeal pursuant to our Rule 308(a) (87 Ill. 2d R. 308(a)). The following issue was submitted for review:

> "Whether a railroad employee covered under the provisions of the Railroad [*sic*] Labor Act, 45 U.S.C. section 151 *et seq.* may bring an action in state court against his employer for wrongful discharge without first exhausting his administrative remedies available under the Railroad [*sic*] Labor Act."

A majority of the appellate court reversed the trial court and entered judgment dismissing plaintiff's complaint with prejudice. (123 Ill. App. 3d 1038.) In so deciding, the court did not address either the issue certified or

those briefed by the parties but relied instead on its decision in *Mouser v. Granite City Steel Division* (1984), 121 Ill. App. 3d 834, which held that the tort of retaliatory discharge was not available to an employee covered by a collective-bargaining agreement.

Plaintiff sought leave to appeal to this court. On leave to appeal, this court entered an order, under its supervisory authority, reversing the judgment of the appellate court and remanding the cause to the circuit court to proceed in conformity with *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill. 2d 143. This order was predicated on the belief that our recent decision in *Midgett* was dispositive. See 101 Ill. 2d 566.

Defendant moved for reconsideration of the supervisory order. In its memorandum supporting the motion, defendant argued that the RLA preempts any State court adjudication of employment-based disputes between railroads and their employees, including an action for retaliatory discharge. Upon reconsideration, the following order was entered: "[T]he motion for reconsideration of the supervisory order entered in this cause on October 19, 1984, is allowed. Reconsideration of this case will be confined to the Federal preemption issue [and the collective-bargaining-agreement issue]."

The factual basis of plaintiff's claim began with an injury to his right knee sustained in January 1972. Plaintiff recovered and was certified as fit to return to work with defendant by his physician and defendant's physicians. In June 1972, plaintiff filed suit to recover damages for the knee injury pursuant to the Federal Employers' Liability Act (45 U.S.C. secs. 51 through 60 (1970)) (FELA), a Federal statute applicable to interstate railroads in their capacity as employers. FELA imposes liability on railroad employers for injuries to employees caused by an employer's negligence. (45 U.S.C. sec. 51 (1970).) This suit was tried to a verdict, but the record does not indicate which party prevailed on the verdict.

Plaintiff sustained a second work-related injury in December 1978. The injury was to his back. In the course of various medical examinations conducted by defendant's

physicians occasioned by this second injury, interest in plaintiff's earlier knee injury was revived.

A physician for defendant reported that he was more concerned about plaintiff's prior knee injury than he was about the recent back injury. In a report to defendant in April 1979, the physician noted that the knee had undergone "degenerative change." Thereafter, in December 1979, the chief medical officer for defendant permanently disqualified plaintiff from his position as a carman welder because of "degenerative changes in the right knee." Plaintiff was permanently disqualified even though his physician had reported that plaintiff had no disability from either the knee or back injuries which would restrict him in the performance of his duties.

One week after his permanent disqualification plaintiff filed a grievance pursuant to the terms of the collective-bargaining agreement in effect between his union and defendant. One month later, in January 1980, plaintiff filed a second suit under FELA in State court seeking recovery for his back injury. The record does not disclose the result of this second FELA action. Six months later, in July 1980, plaintiff filed the instant action.

In his complaint, plaintiff alleged that his permanent disqualification as a carman welder was in retaliation for having sued defendant under FELA. At the time plaintiff filed his action for retaliatory discharge the second suit under FELA and his grievance were pending. Plaintiff's grievance has since been resolved. The grievance was referred to the National Railroad Adjustment Board in February 1981 as provided by the RLA. Resolution was reached in July 1983 when plaintiff was ordered reinstated with retroactive seniority upon securing a favorable medical report from a jointly selected panel of three physicians. Plaintiff was reinstated with full seniority pursuant to this order in September 1983.

This record reveals that, within seven months of his permanent disqualification as a carman welder, plaintiff had initiated actions in three separate forums. Our present concern is with the last action taken, the suit for

retaliatory discharge. We address the limited issue presented: Does the RLA preempt an action for retaliatory discharge brought by an employee covered by the Act?

The leading case on the preemptive effect of the RLA is *Andrews v. Louisville & Nashville R.R. Co.* (1972), 406 U.S. 320, 32 L. Ed. 2d 95, 92 S. Ct. 1562. There the Supreme Court held that an employee who was not permitted to return to work by his employer after recovering from injuries sustained in an automobile accident could not maintain a suit in State court on a State-law contract claim for wrongful discharge. The court found that the RLA governed the dispute. The court also held that the RLA preempted State actions based on wrongful discharge and that the National Railroad Adjustment Board has exclusive jurisdiction to adjudicate all claims arising under the RLA.

Plaintiff attempts to distinguish his case from *Andrews* by pointing out that *Andrews* addressed *wrongful* rather than *retaliatory* discharge. He concedes that wrongful discharge is a claim grounded in the contract of employment, thereby falling within the exclusive jurisdiction of the RLA. However, plaintiff contends that his claim of retaliatory discharge is not a contractual action but, rather, a tort action. Because his action is in tort, plaintiff argues that *Andrews* is inapposite. We disagree. The court in *Andrews* made it clear that the preemptive effect of the RLA was not limited to contractual disputes. The court explained that "the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent *stems not from any contractual undertaking between the parties but from the Act itself.*" (Emphasis added.) 406 U.S. 320, 323, 32 L. Ed. 2d 95, 99, 92 S. Ct. 1562, 1565.

Moreover plaintiff's contention was recently rejected by the United States Court of Appeals for the Seventh Circuit, in *Jackson v. Consolidation Rail Corp.* (7th Cir. 1983), 717 F.2d 1045, 1049. There, as in the instant case, a railroad employee sought recovery on a State-law tort claim for retaliatory discharge, alleging that he was terminated for filing an action under the FELA. The plaintiff in

Jackson argued that *Andrews* was not controlling because *Andrews* applied to "wrongful" rather to "retaliatory" discharge. The court did not find this distinction persuasive, characterizing retaliatory discharge as merely one type of wrongful discharge. (717 F.2d 1045, 1049.) The court went on to note that the State-law claim was "identical to the claim he would have made, had he pursued the grievance through administrative channels." (717 F.2d 1045, 1054.) Because the State-law tort claim and any claim brought under the RLA would be the same claims, the court found *Andrews* controlling and expressly held that the RLA preempts a State-law tort action for retaliatory discharge premised on termination for having filed suit under the FELA. 717 F.2d 1045, 1051, 1056.

We agree with the Seventh Circuit's analysis and application of *Andrews*. We therefore hold that the RLA preempts our State-law tort action alleging retaliatory discharge for having filed suit under the FELA where, as here, it is brought by an employee covered by the RLA.

Plaintiff seeks to avoid the preemptive effect of the RLA by arguing that his case falls within the ambit of certain recognized exceptions to preemption. Specifically, he argues that preemption does not apply "where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters & Joiners of America* (1977), 430 U.S. 290, 302, 51 L. Ed. 2d 338, 351, 97 S. Ct. 1056, 1064.

Plaintiff's reliance on *Farmer* is misplaced. First, the *Farmer* exception to preemption, by its terms, applies to the preemptive effect of the National Labor Relations Act (430 U.S. 290, 292, 51 L. Ed. 2d 338, 345, 97 S. Ct. 1056, 1059), not to the RLA. Second, assuming the applicability of *Farmer* to the instant case, our reading of the RLA indicates that a State-law action for retaliatory discharge would "threaten undue interference with the federal regulatory scheme." The RLA is an elaborate and extensive administrative scheme. (45 U.S.C. secs. 151 through 164 (1982).) Under this scheme "disputes *** growing out of

grievances" are to be resolved in the first instance by the parties. If the parties are unsuccessful, the RLA provides that the dispute be referred to the National Railroad Adjustment Board for resolution. (45 U.S.C. sec. 153 First (i) (1982).) Decisions of the Adjustment Board are final and binding. (45 U.S.C. sec. 153 First (m) (1982).) Under the RLA, a party dissatisfied with a decision of the Adjustment Board may obtain limited review in Federal district court with appeal to the court of appeals. (45 U.S.C. sec. 153 First (q) (1982).) The RLA does not accord original jurisdiction over employment-related disputes to either Federal or State courts. Original, exclusive jurisdiction is given to the Adjustment Board. (45 U.S.C. sec. 153 First (i) (1982).) As noted above, jurisdiction over appeals from decisions of the Adjustment Board is given the Federal courts. 45 U.S.C. sec. 153 First (q) (1982).

Our review of the RLA indicates that plaintiff's suit for retaliatory discharge is precluded as an "undue interference" with the dispute-resolution scheme of the RLA. Stripped to its essentials, plaintiff's suit is a reformulation in tort of his grievance which, as the record shows, fell within the purview of the RLA. Allowing plaintiff's suit to proceed would allow a State court, applying State law, to resolve "disputes *** growing out of grievances." (45 U.S.C. sec. 153 First (i) (1982).) Certainly, this result would unduly interfere with the operation of the dispute-resolution machinery of the RLA. Therefore, even if *Farmer* applies to cases arising under the RLA, it is of no assistance to plaintiff.

A thorough reading of the RLA makes clear Congress' intent that employment-based disputes between parties covered by the RLA are to be resolved exclusively pursuant to the Act. Under the RLA, State courts have no jurisdiction to hear and resolve such disputes. (45 U.S.C. secs. 153 First (i), (q) (1982).) Because plaintiff's tort action for retaliatory discharge is, in essence, an employment-based dispute, we hold that it is preempted by the RLA.

For the reasons here stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.

NO. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Appellant,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)
	)
Appellee.	)

(Date Entered: February 4, 1986)

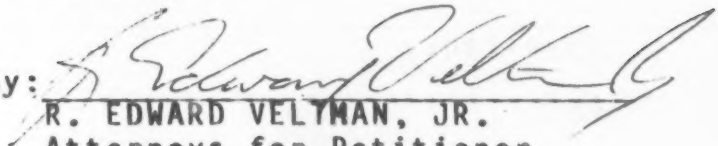
The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Goldenhersh, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 14, 1986.

Enclosed is a copy of Justice Simon's dissent.

Respectfully submitted,

CRAIN, COOKSEY, VELTMAN &
PURSELL, LTD.

By: 

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